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U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass. 3/F
425 I Street N.W.
Washington, D.C. 20536

[redacted]

File [redacted] Office: Nebraska Service Center Date: MAR 12 2004

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER: [redacted]

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a telecommunicating firm. It seeks to employ the beneficiary permanently in the United States as an accountant. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL), accompanies the petition. The director determined that the petitioner had not established its continuing ability to pay the proffered wage as of the date the priority date was established. The director also determined that the beneficiary did not meet the qualifications of the position as stated in the labor certification as of the priority date.

On appeal, counsel states the petitioner was able to pay the proffered wage as of the priority date and continues to have that ability. He also states that the beneficiary meets the labor certification requirements through a combination of education and professional experience.

With the petition counsel submitted an ETA 750 indicating the proffered position required a bachelor's degree in accounting and two years of accounting related experience. The ETA was accepted by DOL on April 18, 2001. Counsel also submitted letters from the beneficiary's previous employers indicating he had worked in accounting or an accounting related position for approximately six years, and a copy of a certificate from the University of Jordan indicating the beneficiary had earned a Bachelor's of Science degree in Business Administration with a minor in accounting.

In addition, counsel submitted the petitioner's 2001 Form 1120, U.S. Corporation Income Tax Return, and copies of petitioner's corporate bank statements for the months of December 2001 through May 2002. The petitioner's tax return shows taxable income before net operating loss deduction and special deductions of $2,023, less than the proffered wage.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

Furthermore, 8 CFR 204.5(l)(3)(ii) states, in pertinent part:

> (C) *Professionals.* If the petition is for a professional, the petition must be accompanied by

> evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions.

8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

To be eligible for approval, a beneficiary must have all of the training, education, and experience specified on the labor certification as of the date that the request for labor certification was accepted for processing by DOL. The petitioner's priority date in this instance is April 18, 2001. The beneficiary's salary as stated on the labor certification is $22.50 per hour or $46,800 per year.

In a request for evidence (RFE) dated December 2, 2002, the director requested evidence that the beneficiary had a bachelor's degree in accounting and to establish that the petitioner had the ability to pay the proffered wage as of the priority date and that it continued to have the ability to pay. In response, counsel submitted a copy of the beneficiary's transcript from the University of Jordan and copies of the petitioner's 2001 Form 940-EZ, Employer's Annual Federal Unemployment (FUTA) Tax Return, and federal and state quarterly tax returns for the last three quarters of 2002.

The director denied the petition, determining that the petitioner had not established its ability to pay the proffered wage as of the priority date, and that the beneficiary did not meet the education requirements of the labor certification.

On appeal, counsel argues that the analysis of the ability to pay the proffered wage was based on faulty reasoning as it relied only on the comparison of the proffered wage and taxable income. Counsel states that CIS failed to consider additional sources of income. He asserts that depreciation for example adds an additional $18,900 to the petitioner's positive cash flow for

2001.

On appeal, counsel submitted additional evidence of the petitioner's ability to pay the proffered wage in the form of the petitioner's 2002 Form 1120, a copy of Form W-2 Wage and Tax Statement for 2002 showing that the petitioner paid the beneficiary $10,400 during that year,[1] and copies of the petitioner's corporate bank statements for the months of June 2002 through April 2003.

In determining the petitioner's ability to pay the proffered wage, CIS will examine the net income reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. V. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *K.C.P. Food, Co., Inc. v. Sava*, the court held that CIS had properly relied on the petitioner's net income as stated on the petitioner's corporate income tax returns rather than the petitioner's gross income. 623 F. Supp. at 1084. Finally, there is no precedent that would allow the petitioner to add back depreciation expense to net income. *See also Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054.

The petitioner's 2001 tax return shows taxable income before net operating loss deduction and special deductions of $2,023. The petitioner could not have paid the proffered wage from net taxable income. The return also shows current assets of $60,596 and current liabilities of $17,341. The petitioner's net current assets for 2001, therefore, amounted to $43,255. The petitioner could not have paid a year's salary of $46,800 from this amount; however, the priority date for this petition is April 18, 2001, and the petitioner is liable for the proffered wage as of that date. The petitioner, therefore, was responsible for 257 days of 2001. Payment for that much of 2001 would have amounted to approximately $32,953. The petitioner could have met that amount from its 2001 net current assets.

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[1] In his brief, counsel refers to this as a 2001 Form W2. There is no evidence in the record to reflect any wages paid to the beneficiary by the petitioner in 2001.

The petitioner's 2002 tax return shows taxable income before net operating loss deduction and special deductions of $23,783. The petitioner paid the beneficiary $10,400 during calendar year 2002. The petitioner could not have paid the proffered wage from net income. The return also shows current assets of $125,697 and current liabilities of $7,617. The petitioner could have paid the beneficiary the proffered wage from net current assets.

The petitioner has overcome this portion of the director's decision to deny the petition.

Counsel states that the petitioner holds the foreign equivalent of a baccalaureate degree from a United States accredited institution of higher education. Counsel states the beneficiary has a Bachelor's of Science degree in Business Administration with a minor in Accounting, and has substantial work experience beyond his educational achievements. He argues that Congress intended the "equivalent" language of the statute to include those who gained their professional competency from education, experience or, as in this case, a combination of both. An evaluation of the beneficiary's foreign degree by International Education Consulting, submitted on appeal and dated June 24, 2003, states that the beneficiary's foreign degree is equivalent to a Bachelor of Science in Business Administration with a minor in Accounting from an accredited institution of higher education in the United States.

Counsel's arguments are unpersuasive and miss the point. The petitioner in its application for labor certification specifically described the education and experience requirements it sought as a Bachelor's Degree with a major in Accounting and two years experience in an accounting related field. Counsel acknowledges in his brief that a professional degree in accounting is required for this position. The beneficiary's degree is in Business Administration, with only a minor in Accounting; thus, he does not meet the education requirements of the ETA 750.

Upon review, the petitioner has been unable to present sufficient evidence to overcome the finding of the director regarding the qualifications of the beneficiary for the position. The petitioner has not established eligibility pursuant to section 203 (b)(3)(A)(i) of the Act, and the petition may not be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.